

HOUSE BILL 3701
By Armstrong

AN ACT to amend Tennessee Code Annotated, Title 12,
Chapter 4, relative to public projects.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 12, Chapter 4, is amended by adding
Sections 2 through 9 of this act as new part 9 thereto.

SECTION 2. As used in this part, unless the context otherwise requires:

(1) "Construction services" means services provided under a design-build
contract that are not design services;

(2) "Design-build contract" means a contract between a public governmental
entity and a design-builder to furnish:

(A) Architectural, engineering, and related design services as required for
a public project; and

(B) Labor, materials, and other construction services for such public
project;

(3) "Design-builder" means a person that furnishes the necessary design and
construction services under a design-build contract, whether by such person or through
contractual arrangements;

(4) "Design criteria developer" means a person licensed pursuant to title 62,
chapter 2, as an architect or as a professional engineer and who is responsible for
preparing the design criteria package for the public governmental entity for a design-
build project;

(5) "Design criteria package" means a set of documents that provides sufficient information to permit a bidder to prepare a proposal in response to a public governmental entity's request for proposals;

(6) "Design services" means services that are:

(A) Within the scope of practice specified by title 62, chapter 2, for architecture or for professional engineering; or

(B) Performed by a registered architect or professional engineer in connection with the architect's or engineer's professional employment or practice;

(7) "Person" means an individual, a firm, a partnership, a limited liability company, a joint venture, an association, a corporation, or another legal entity;

(8) "Proposal" means an offer by a potential design-builder to enter into a design-build contract for a public project in response to a request for proposals;

(9)

(A) "Public project" means the process of designing, constructing, reconstructing, altering, or renovating a public building, an airport facility, or another structure or improvement that is paid for out of:

(i) A public fund; or

(ii) A special assessment;

(B) "Public project" includes:

(i) A process described in subdivision (9)(A) relating to a building or structure leased by a governmental entity under a lease containing an option to purchase; and

(ii) A public improvement to real property owned by a governmental entity;

(C) "Public project" does not include the process of designing, constructing, altering, or repairing a public highway; and

(10) "Team" means a single entity that is responsible for a public project using the design-build contracting method. The entity may include:

(A) The design-builder; and

(B) A person who:

(i) Subcontracts with the design-builder;

(ii) Is a partner of the design-builder;

(iii) Enters into a joint venture with the design-builder; and

(iv) Performs work under a design-build contract.

SECTION 3.

(a) A design-build contract awarded as provided in this part is valid and enforceable.

(b) Before entering into a design-build contract under this part for a public project, the governing body of a governmental entity must adopt a resolution authorizing the use of the design-build contracting method for the public project. The resolution must identify the members of the technical review committee appointed by Section 5. The governing body must adopt the resolution at a public meeting for which public notice has been provided.

SECTION 4.

(a) At the time design services or construction services are to be provided under a design-build contract, a design-builder must be or have a responsible person who is qualified to provide the design services and construction services required to complete the public project.

(b) A design-builder may contract with the governmental entity to provide design services and construction services that the design-builder is not qualified to perform if the design-builder provides the services through subcontracts with persons who are qualified in accordance with this part.

(c) This part does not limit or eliminate the responsibility or liability imposed by Tennessee law on a person providing design services to the governmental entity or other third parties.

SECTION 5.

(a) Before entering into a design-build contract, a governmental entity must appoint a technical review committee of at least three (3) individuals.

(1) The members of the technical review committee must include the following:

(A) A representative of the governmental entity;

(B) At least two (2) persons among the following:

(i) Architects;

(ii) Professional engineers; and

(iii) General contractors.

(2) A member of the technical review committee who is an architect or a professional engineer may be:

(A) An employee of the governmental entity; or

(B) An outside consultant retained by the governmental entity for the specific purpose of evaluating proposals submitted under this part.

(3) The design criteria developer may serve as a full member or a nonvoting adviser of the committee.

(b)

(1) A member of the technical review committee may not submit a proposal for or furnish design services or construction services under the design-build contract.

(2) The design-builder may not delegate or subcontract professional services or construction services under the design-build contract to a member of the technical review committee.

(c) Each member of the technical review committee must certify for each request for proposals that there is not a conflict of interest between the member and the design-builder responding to the request for proposals. If a conflict of interest exists, the member shall be replaced before the review of any proposal.

(d) The technical review committee shall:

(1) Review qualifications of potential design-builders as provided in Section 6; and

(2) Rate and score qualitative proposals as provided in Section 8.

(e) The technical review committee may interview persons submitting proposals and conduct other business necessary to fulfill the purposes of this part.

(f) Except for interviews of persons submitting proposals, meetings of the technical review committee shall be open to the public.

SECTION 6.

(a) When design-build contracting has been authorized, a governmental entity shall publish a notice of a request for qualifications. The notice must allow at least thirty (30) days for potential design-builders to respond to the request for qualifications.

(b)

(1) A notice pursuant to subsection (a) must provide the following:

(A) An overview of the project and selection process, including the following:

(i) A description of the project, including the:

(a) Size and function of the facility that is the subject of the project;

(b) Approximate budget; and

(c) Anticipated schedule;

(ii) A description of the selection process, including:

(a) The process for communications between the governmental entity and potential design-builders;

(b) The schedule for the selection process;

(c) The technical review committee procedure; and

(d) A description of submission requirements;

(iii) The general qualifications for prospective offerors, including:

(a) Appropriate experience with similar projects;

(b) Team experience with design-build;

(c) Organizational resources and depth;

(d) Licensing requirements;

(e) Financial strength and bonding capacity;

(f) An offeror's history of contracting with or hiring minority business enterprises and women's business enterprises;

(g) Litigation and disputes history; and

(h) Experience in dealing with bonding authorities;

(iv) The project specification qualifications for prospective offerors, including:

(a) Team experience with the facility or building type that is the subject of the project;

(b) Team performance record, including quality, schedule, and cost of each project;

(c) Proposed team composition, including the team's past experience in working together;

(d) Current capacity to manage the project;

(e) Proposed key project personnel; and

(f) Client references; and

(v) A description of the qualifications statement evaluation process, which shall include:

(a) An established rating system that complies with Sections 4 and 5; and

(b) A briefing session or a formal question and answer process conducted with a potential offeror before submission of a proposal in response to a request for proposals.

(2) A potential design-builder responding to the request for qualifications must submit a verified statement of qualifications setting forth the qualifications of the potential design-builder and team members, if applicable, and provide the other information required by the request for qualifications.

(c) The verified statement of qualifications required under this section must include the following:

(1) A listing of all prime contractors and architectural and engineering firms that participate financially as part of the team;

(2) A statement that:

(A) The design-builder or the team members have completed or demonstrated the experience, competency, capability, and capacity to complete projects of similar size, scope, or complexity; and

(B) Key personnel have sufficient experience and training to competently manage and complete the design and construction of the project;

(3) A statement that the design-builder or team members have all licenses, registrations, and credentials required to design and construct the project, including information on any revocation or suspension of a license, credential, or registration;

(4) A statement that the design-builder has the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance;

(5) The experience modifier rate, the United States Occupational Safety and Health Administration total recordable case incident rate (TCIR) and days away, restricted or transferred case incident rate (DART) for the design-builder and each design build team, and the average United States Occupational Safety and Health Administration TCIR and DART rates for the industrial classification of the design-builder and each design-build team;

(6) A statement that the design-builder or the employees of the team performing construction services, including the employees of all subcontractors,

have completed or are enrolled in an apprenticeship program certified by the United States Department of Labor Bureau of Apprenticeship and Training;

(7) Information regarding any prior serious, repeat, willful, or criminal violations of the federal Occupational Safety and Health Act of 1970 and any equivalent violation under a state plan;

(8) Information concerning the debarment, disqualification, or removal of the design-builder or a team member from a federal, state, or local government public works project; and

(9) Information concerning the bankruptcy or receivership of the design-builder or a team member.

(d) The technical review committee shall rate the potential design-builders responding to the request for qualifications based on a rating system. The rating system shall include consideration of any of the following:

(1) The design-builder's experience;

(2) The design-builder's financial and bonding capacity;

(3) The design-builder's managerial resources and management plan;

(4) The design-builder's safety record;

(5) The design-builder's past performance and capacity to perform;

(6) The design-builder's ability to complete the work in a timely and satisfactory manner; and

(7) Other selection criteria set forth or verified in the request for qualifications.

(e) The technical review committee may not consider cost-related or price-related evaluation factors when rating the potential design-builders.

(f) The technical review committee shall select at least three (3) potential design-builders considered to be the most highly qualified to perform the required services based on the rankings of the potential design-builders. The technical review committee shall report the selection of qualified design-builders to the governmental entity.

(g) Notwithstanding the provisions of subsection (f), if only two (2) potential design-builders respond to the request for qualifications, the technical review committee may report the two (2) potential design-builders to the governmental entity if the technical review committee finds that both potential design-builders are qualified to perform the required services.

(h) If:

(1) Only one (1) potential design-builder responds to the request for qualifications; or

(2) Only one (1) of the potential design-builders responding to the request for qualifications is qualified to perform the required services;

then the governmental entity may not use the design-build contracting method authorized under this part, unless the governing body of the governmental entity adopts a resolution expressly authorizing the governmental entity to send the one (1) potential designer-builder a request for proposal. The governing body must adopt the resolution at a public meeting for which public notice has been provided.

SECTION 7.

(a) The governmental entity shall issue a request for proposals to the potential design-builders selected. Each request for proposals must contain a design criteria package.

(b) The design criteria developer shall prepare the design criteria package.

(c) The design criteria developer may not submit a proposal or furnish design or construction services under the contract.

(d) The design-builder may not delegate or subcontract design services or construction services under the design-build contract to the design criteria developer.

(e) The governmental entity shall determine the scope and level of detail required for the design criteria package.

(f) The design criteria package must specify the design criteria necessary to describe the public project, which may include, as appropriate, the following:

- (1) A legal description and survey of the site;
- (2) Interior space requirements;
- (3) Special material requirements;
- (4) Material quality standards;
- (5) Preliminary design criteria for the project;
- (6) Special equipment requirements;
- (7) Cost or budget estimates;
- (8) Quality assurance and quality control requirements;
- (9) Site development requirements;
- (10) Compliance with applicable codes and ordinances;
- (11) Permits and connections to utilities;
- (12) Requirements for storm water and roads;
- (13) Parking requirements;
- (14) Soil borings and geotechnical information or performance specifications;
- (15) Life cycle costing and energy consumption requirements;
- (16) Performance specifications, including warranties;

(17) Project schedule; and

(18) Any other applicable requirements.

(g) In addition to the design criteria package, a request for proposals must include the following:

(1) Instructions;

(2) Proposal forms and schedules;

(3) General and special conditions;

(4) The basis for evaluation of proposals, including a description of the selection criteria with the weight assigned to each criteria;

(5) A determination of the current prevailing wage; and

(6) Any other instructions, documents, or information relevant to the public project that the governmental entity considers relevant.

(h) The request for proposals must include the requirement that a proposal be submitted in the following two (2) packages:

(1) A qualitative proposal; and

(2) A price proposal.

(i) The governmental entity may provide a stipend to a non-successful bidder to encourage competition under this part.

SECTION 8.

(a) A proposal submitted in response to a request for proposals must satisfy the following:

(1) The qualitative proposal and the price proposal must be submitted simultaneously in separately sealed and identified packages. The price proposal must remain sealed until opened in public; and

(2) A proposal must identify each person with whom the offeror proposes to enter into subcontracts for primary design services and primary construction services, including any subcontractors, under the design-build contract. The governmental entity may determine requirements under this section.

(b) The price proposal must:

(1) Contain one (1) lump sum cost of all design, construction engineering, inspection, and construction costs of the proposed project; or

(2) Establish a maximum cost of the design-build contract that will not be exceeded if the proposal is accepted without change.

(c) The qualitative proposal must include all documents, information, and data requested in the request for proposals.

(d) The governmental entity shall submit the qualitative proposals to the technical review committee.

(e) The governmental entity may require clarifications from an offeror to ensure conformance of proposals with the design criteria and administrative requirements.

(f) The technical review committee may not consider a proposal until the design criteria developer provides its professional opinion that the proposal conforms with the design criteria.

(g) The technical review committee shall review the qualitative proposals and establish a score for each qualitative proposal based on the factors, weighting, and process identified in the request for proposals.

(h) The technical review committee shall give a written composite score for each qualitative proposal.

(i) The governmental entity shall notify all offerors of the date, time, and location of the public opening of the sealed price proposals at least seven (7) days before the opening date.

(j) The governmental entity shall publicly open the sealed price proposals and divide each offeror's price by the written composite score that the technical review committee has given to each qualitative proposal to obtain an adjusted price.

(k) The governmental entity shall accept the proposal that provides the governmental entity with the lowest adjusted price providing the best value to the taxpayer. The governmental entity is not required to accept the lowest bid proposal.

(l) The governmental entity may reject any and all proposals, except for the purpose of evading the provisions and policies of this part. A governmental entity must make a rejection of proposals under this section in a written document that states the reasons for rejecting proposals.

(m) The governmental entity may negotiate any contract term with the offeror selected, except for those terms identified in the request for proposals as nonnegotiable.

(n)

(1) If the governmental entity is unable to negotiate a contract with its first selection, the governmental entity may:

(A) Terminate negotiations with that offeror; and

(B) Negotiate with the next lowest adjusted price offeror.

(2) A governmental entity shall continue in accordance with this procedure until a contract agreement is reached or the selection process is terminated.

(o) Until a proposal is accepted, the drawings, specifications, and other information in the proposal are the property of the offeror.

(p) After a proposal is accepted, ownership of the drawings, specifications, and information in the drawings and specifications shall be determined under Tennessee law and the terms of the design-build contract.

SECTION 9.

(a) A design-build contract may be conditional upon subsequent refinements in scope and price and may permit the governmental entity to make changes in the scope of the project without invalidating the design-build contract.

(b) A person identified as a person with whom the design-builder proposes to enter into subcontracts for primary design services and primary construction services under the design-build contract may not be replaced without the approval of the governmental entity and a written determination by the governmental entity that a legitimate reason exists for the replacement.

(c) If a design-builder violates subsection (b), the governmental entity may cancel the award of or may terminate a design-build contract.

(d) After a design-build contract is awarded, the maximum cost established in the successful proposal may be adjusted by negotiated agreement between the governmental entity and the design-builder to reflect modifications in the proposed design-build project.

(e) The governmental entity shall require the design-builder to furnish performance and payment bonds for the project.

(f) A performance or payment bond is not required for, and does not provide coverage for, the part of a design-build contract that includes design services only.

(g) The provisions of subsection (f) shall not impair the ability of the governmental entity to seek recovery under the contract from the design-builder for errors, omissions, or defects in the design services.

(h) A governmental entity may not, with respect to a public project covered by this part, require an offeror to:

(1) Make application to;

(2) Furnish financial data to; or

(3) Obtain any of the surety bonds, or surety bond components of wrap-up insurance, that are specified in connection with a design-build contract or specified by any law from;

any particular insurance or surety company, agent, or broker.

(i) A determination for a public project to be constructed under a design-build contract shall be made and filed with the governmental entity at least two (2) weeks before the date fixed for submission of the qualitative proposal and the price proposal.

(j) If the technical review committee fails to act or to file a determination within the time required by this section, the governmental entity shall make the determination, and its finding shall be final.

(k) The time periods set forth in this section apply to any construction services provided for a public project to be constructed under a design-build contract.

SECTION 10. This act shall take effect January 1, 2007, the public welfare requiring it.